IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

The Miller Rubber Company, a corporation, and The Miller Rubber Company of California, a corporation,

Appellants,

vs.

Citizens Trust & Savings Bank, a corporation, as Trustee in Bankruptcy of the Estate of W. D. Newerf, doing business as W. D. Newerf Rubber Company, Bankrupt,

Appellee.

No. 2737

PETITION FOR REHEARING.

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To the Honorable United States Circuit Court of Appeals for the Ninth Circuit:

Now comes The Miller Rubber Company, a corporation, and The Miller Rubber Company of California, a corporation, appellants herein, and for their petition for a rehearing herein respectfully present to the court the following grounds:

I.

The principal question before the court being the construction of the contracts of November 6th, 1911, and June 11, 1914, set forth in the transcript of record at page 90, *et seq.*, it must be conceded that the construction of said contracts depends upon the law of the state of California, upon the ground that the United States courts follow the decisions of the state courts upon all such questions as here presented.

Authority for this is found in:

Thompson v. Fairbanks, 196 U. S. 516;
Humphrey v. Tatman, 198 U. S. 91;
York Mfg. Co. v. Cassell, 201 U. S. 344;
Dale v. Patterson, 234 U. S. 399.

First syllabus:

"The legal effect of a transaction involving pledge or hypothecation depends upon the local law; and if the state law permits the pledged property to remain under certain conditions in the possession of the pledgor, and those conditions exist, the trustee in bankruptcy of the pledgor takes subject to the rights of the pledgee."

Taney v. Penn. Bank, 232 U. S. 174.

In fact counsel for the trustee, on page 21 of their brief say:

"The cases in bankruptcy state that, where possible, the laws of the state in which the controversy arises, should be looked to for a rule to govern the decisions of the bankrupt courts. Under the laws of the state of California, conditional sale contracts are valid; but the cases in which they have been held to be valid,

have been cases in which the property to be consigned was not for sale or consumption by the vendee,"
and then cite a number of cases upon the subject.

II.

Counsel in their brief suggest that conditional sales are only valid as to property which was not for sale or consumption.

In Vermont Marble Company v. Brow, 109 Cal. 236, the first and second syllabi are:

First syllabus:

> "Where goods are delivered on consignment under a contract that they are to be paid for by the consignee at a listed price when sold, and to remain the property of the vendor until paid for, with the right in the consignee to sell them for any price he may fix in his own name, the transaction is a sale to the consignee upon condition, the condition being that the consignee shall sell to some third person, until which time he is under no obligation to pay the listed price, and may be compelled to surrender the goods to the consignor upon demand; and prior to sale by him the consignee has no title which can be the subject of levy or sale upon execution for his debts."

Second syllabus:

> "The seller has a common law right by appropriate contract to retain the title in himself until the performance of some valid condition on the part of the buyer, and *the fact that the property is to be resold by the first purchaser does not affect the rule.*"

Opinion:

"Defendant was constable of Marysville township in Yuba county, and was sued in this action by plaintiff, a corporation, for the value of certain marble monuments sold by him July 10, 1893, under writs of execution issued from the justice's court of said township against the property of one Plymire upon judgments obtained there by creditors of Plymire. *The chief question involved is whether the marble when levied upon and sold was the property of plaintiff or of said Plymire.* The latter had a marble shop at Marysville and was a dealer in funerary stones and monuments; he had been accustomed for several years to purchase from plaintiff unfinished monuments and other marble needed in his business, and on July 19, 1892, he was in plaintiff's debt some $2,500.00 for such materials purchased previously to that time, and plaintiff was apprehensive that further sales to him outright would involve loss; to prevent this Plymire agreed in writing with the marble company on the date last mentioned, that in consideration of its sending to him certain specified monuments 'on consignment' he would hold the same as the property of the company until sold, and subject to its order; that as fast as he sold the monuments he would remit the money—the cost price at which each was listed to him—and when he took notes in lieu of cash he would remit the notes as collateral for his account. Subsequently, in May, 1893, Plymire agreed with plaintiff for a further consignment of goods, specifically described, written memoranda of which agreement provided in substance that he should keep an account of the sale of the monuments described in

a book, and send such book to the marble company on the first of each month, and, 'as fast as said work is sold and erected' pay to the company the list or cost price to him of each piece of marble sold by him, 'either by cash or customers' notes,' the same to be placed to his credit as fast as cash should be received; that he held the marble merely on consignment to be paid for when sold, and that it remained the property of the marble company 'until paid for, as above,' and at all times subject to its order. Ten monuments, of the value of $683.00, were converted by defendant, as the court found, and of these, three had been delivered to Plymire under his arrangement with plaintiff of July, 1892, and seven under that of May, 1893. By the terms of an oral agreement not embodied in said written memoranda Plymire promised that whenever he received payment from a customer for a monument he would pay plaintiff an additional sum of 25% on the cost price charged to him for the same by plaintiff; which further percentage was to be applied on his indebtedness of $2,500.00 existing before July, 1892. The debts on which the judgments mentioned were recovered against Plymire accrued prior to the receipt by him of any part of the goods in controversy.

"Plymire, it was understood, would take orders for and sell the marble in his own name; he had the right to fix the selling price and the terms of sale; he was to bear the cost of transporting the marble from San Francisco to Marysville; apparently the marble company exercised no control over his business. The monuments, when seized by defendant, were in the same condition as when received by Plymire from plaintiff, he having done no lettering or other work on them. He testified

at the trial: 'I was not to sell these monuments in the same condition that I received them. I have to sell them first and then put on the inscription. If a man wanted a design I showed him a style of monument and told him what it would come to when finished and set up; found out how he wanted it lettered, whether he wished any further design carved on it, and then fixed it up, put a bottom base on it, set it up, and then took the money for it.' Before the execution sale plaintiff demanded the property of defendant, the particulars of which demand appear in another connection.

"*Appellant contends* that the facts stated evidence a *sale* on credit in which the title to the goods passed at once to Plymire, and *they thus became liable to execution for his debts,* and it is said that it is 'unmeaning for parties to a contract to say it shall not amount to a sale when it contains every element of a sale.' This latter proposition is doubtless correct; *the transaction must be judged by the intent of the parties to it,* gathered from the whole scope and effect of their language and their explanatory conduct; mere verbal formulas are to be disregarded if inconsistent with a specific intent thus manifested. But looking at the facts in the light of this principle *we find no transmission of title to Plymire.* 'Mere transfer of possession without the agreement, express or implied, that such transfer is a sale on the one hand and a purchase on the other, will not be a sale or have the effect to transfer the title.' Borland v. Nevada Bank, 99 Cal. 94, 37 Am. St. Rep. 32. We consider that the true nature of the transaction was that of a sale upon condition—the condi-

tion being, as to each monument, that *Plymire should sell the same to some third person;* until then he was under no obligation to pay plaintiff the cost price, and until then he was compellable to surrender the goods to plaintiff upon demand. When he sold a monument he was precisely within the case put by Mellish, L. J., in *Ex parte* White, 6 L. R. Ch. App. 397, 405: 'If A hands over his goods to B, and B is to pay him a certain price if he sells, but is at liberty to sell on what terms he pleases, and then B sells to C, the natural inference from these facts is, beyond all doubt, that there is a sale made to B, and another sale from B to C.' *But obviously there is no completed sale to B until he sells to C;* this is illutrated in Nutter v. Wheeler, 2 Low. Dec. (U. S. Dist. Ct.) 346; there W. and Company were in the habit of sending their manufactured goods to one Gear in Boston, and *Gear sold them at such prices and on such terms as he pleased,* not less than the trade prices fixed by W. & Co.; whenever he made a sale he was to pay W. & Co. in thirty days the prices shown in their list to him, less an agreed discount; after a sale was made by him his credit only was looked to by W. & Co.; *Gear became bankrupt,* and W. & Co. took back the goods of their manufacture in his shop unsold. The court said: *'Until a sale was made the property in the goods remained in the defendants (W. & Co.), and they were well justified in reclaiming those which remained on hand at the time of the failure of Gear.' So, in our opinion, at the time of the levy and sale by defendant here the monuments were the property of plaintiff and not liable to execution for Plymire's debts.*

"As suggested by appellant there may be impolicy in allowing a severance of title and possession where an ultimate sale is designed by the parties, but this consideration is for the legislature and not the courts; the common law right of the seller by appropriate contract to retain the title until performance of some valid condition on the part of the buyer has been long recognized in this state, as almost universally elsewhere. (Putnam v. Lamphier, 36 Cal. 151; Kohler v. Hayes, 41 Cal. 455; Hegler v. Eddy, 53 Cal. 597; Sere v. McGovern, 65 Cal. 244; Benjamin on Sales, Bennetts' (6th ed.) 255, 282 *et seq.*)

"*That the property is to be resold by the first (conditional) purchaser does not affect the rule.* (Hirsch v. Steele, 10 Utah 18, and cases cited.)."

We respectfully urge for the earnest consideration of the court that the above case is decisive of the case at bar, that in the case of goods placed on consignment with the right of sale with reservation of title in the consignor, that no title passes to the consignee "which can be the subject of levy or sale upon execution for his debts."

That a careful reading of the Vermont Marble Company v. Brow, *supra,* will show that the contract was almost identical to the contract in the case at bar.

We further offer for the careful consideration the case of Van Allen v. Francis, 123 Cal. 474. This was a sale of a printing press, deferred payments being evidenced by promissory notes and an agreement that said payments should be secured by first mortgage on the property, upon the payment of which the consignor

agreed to execute and deliver a bill of sale. The consignee sold and delivered the property to a corporation, which "had no knowledge nor notice that said contract was in existence in regard to said press and said property, but only had knowledge that it appeared from the books of said William M. Langton (consignee) that an indebtedness of $1,400.00 was due to Van Allen and Boughton (consignors)." No mortgage was executed on the property. Later the corporation assigned to one Hansbrow all of its property for the benefit of creditors and before the commencement of the suit said Hansbrow conveyed the press to defendants Francis. *"Neither the corporation nor Hansbrow, nor the defendants, had any knowledge of any claim of the plaintiffs to be the owners of the property."* On page 477 the court say:

> "The nature of the contract between plaintiffs and Langton first invites consideration. By appellants it is insisted that it shows an absolute sale of the property; by respondent, that the contract is one of conditional sale. We think the latter construction is the true one. Conditional sales are recognized in this state to the fullest extent. (Putnam v. Lamphier, 36 Cal. 151; Kohler v. Hayes, 41 Cal. 455; Hegler v. Eddy, 53 Cal. 597; Sere v. McGovern, 65 Cal. 244; Lowe v. Woods, 100 Cal. 408, 38 Am. St. Rep. 301); and it is well settled that even *bona fide* purchasers from the person to whom personal property is delivered under an executory contract of sale get no valid claim to the property. (Palmer v. Howard, 72 Cal. 293, 1 Am. St. Rep. 60.)
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> * * * * * * * *

"The question whether or not a given contract is or is not a contract of conditional sale is to be determined *wholly by the intent of the parties,* expressed in and deducible from the contract itself. In arriving at the solution of the question, the whole contract is to be considered, and no detached term or condition is to be given prominence or effect over and above another. So that, if the legal effect of the whole contract be to establish a mortgage or a lease or an option to purchase between the parties, the mere negation in another part of the contract of that legal effect will not control. But if, upon the other hand, the intent be clear that title shall not pass until the performance by the vendee of a condition precedent or concurrent, such a contract becomes a conditional sale and not repugnant to any principle of justice or equity, even though possession of the property be given to the opposing purchaser. (Harkness v. Russell, 118 U. S. 663; Rodgers v. Bachman, 109 Cal. 552.) Looking at the terms of this agreement either singly or collectively, it is quite clear that one and all contemplate that there shall be no transfer of title to Langton saving upon the performance by him: 1. Either of the condition precedent, the payment of the moneys, or 2. Upon performance of the condition concurrent, the execution of a mortgage.

* * * * * * * *

"It cannot successfully be argued that the circumstance that Langton was to give a mortgage demonstrates the fact that title to the property must have passed to him, because it is clear from the context that the giving of the mortgage and

the passing of the title were interdependent and concurrent. The contract further provides that the title shall remain in the seller until the mortgage be given, or until the purchase price with interest has been fully paid. Unless there be found in the contract some term, clause, or condition nullifying or modifying this clear provision, this language in itself is of controlling force, for it is of the very essence of a contract of conditional sale that the title shall so remain in the seller until compliance with the condition. Again, in case of default the right of recaption is reserved to the seller, but there is *no condition for the sale of the property, and the payment of any surplus over to the purchaser,* a condition which when found is always strongly persuasive that the contract is one of absolute sale with a reserved lien or mortgage back.

* * * * * * * *

"The significance which appellants seek to attach to the use of the phrase 'purchase price' does not, we think, belong to the language. The declaration is that the title to the property 'shall remain in the sellers until such mortgage be given, or until the purchase price * * * has been fully paid.' A sale is a contract by which, for a pecuniary consideration, called a price, one transfers to another an interest in property. If *there were not in this contract a purchase price, it could not be a sale* either absolute or conditional. 'Sale is a word of precise legal import. * * * It means at all times a contract between parties to give and to pass rights of property for money which the buyer pays or promises to pay the seller for the thing bought and sold.' (Williamson v. Berry, 8 How. 495.)

"Nor can appellants' further contention be sustained, namely, that the fact that Langton's promise to pay is absolute is determinative and conclusive that the sale itself was absolute. In Palmer v. Howard, *supra,* a like circumstance is mentioned but not discussed. In Rodgers v. Bachman, *supra,* the same fact is adverted to, but, while such a matter may be a circumstance in determining the nature of the contract, it is a circumstance and nothing more. It never has been held to be a determinative characteristic, and it cannot be so held without undoing all the law upon the question. There can be no sale at all without an agreement, express or implied, to pay. Lacking such a promise, the contract is a mere option. (Hunt v. Wyman, 100 Mass. 198.) *If the circumstance that the purchaser's promise to pay was absolute made the contract an absolute sale, the determination of the nature of such contracts would be so simple a matter as to have rendered entirely superfluous the vast amount of legal research and acumen that have been displayed by all the courts of this country and England in construing them. In truth, the purchaser's promise is usually an absolute promise.* It was such a promise in Putnam v. Lamphier, *supra;* Parke etc. Co. v. White River etc. Co., 101 Cal. 37; Dunn v. Price, 112 Cal. 46; Hervey v. Locomotive Works, 93 U. S. 664; Harkness v. Russell, *supra;* Preston v. Whitney, 23 Mich. 260; The Marina, 19 Fed. Rep. 760; Quinn v. Parke etc. Co., 5 Wash. 276. Many other cases could be cited where the promise was absolute, and where the sale was held to be conditional, or, if found to be absolute, the finding was never placed upon the ground that the absolute promise determined the question."

Judgment was accordingly rendered for the plaintiff and the judgment affirmed by the Supreme Court of the state of California.

Here again is a case where the property was in the possession of a *bona fide* holder, and the vendor, under the conditional sales contract, recovered its value.

In Holt Mfg. Co. v. Collins, 154 Cal. 265, the eighth syllabus is:

> "The *owner* of a threshing machine, who has delivered the possession thereof to another to whom he has contracted to sell it, under an agreement which gave him the right to terminate the contract and retake the property upon default in the payment of the purchase price, *may exercise his right of terminating the contract after the sheriff had taken possession of the machine under a judgment against the purchaser.*"

Again, in the case of Liver v. Mills, 155 Cal. 459, the court on page 462 say:

> "The validity of conditional sales is fully recognized in this state (Putnam v. Lamphier, 36 Cal. 151; Kohler v. Hayes, 41 Cal. 455; Hegler v. Eddy, 53 Cal. 597; Sere v. McGovern, 65 Cal. 244 (3 Pac. 859); Lowe v. Woods, 100 Cal. 408, (38 Am. St. Rep. 301, 34 Pac. 959), and it is well settled that 'even *bona fide* purchasers from the person to whom personal property is delivered under an executory contract of sale get no valid claim to the property.' (Van Allen v. Francis, 123 Cal. 474 (56 Pac. 339); Palmer v. Howard, 72 Cal. 293 (1 Am. St. Rep. 60, 13 Pac. 858).) The plaintiff did not by his purchase from Thompson and Miller, who were not the owners of the auto-

mobile, but only of a contract enabling them to acquire it upon a compliance with certain conditions, get any rights superior to those held by his grantors."

Still other cases might be cited, some of which are referred to on page 21 of counsel's brief; but we respectfully urge and ask the court for its earnest consideration of these cases to the effect that they are decisive of the case at bar in the maintenance of the rights of the plaintiff in the personal property in dispute.

The fact that some of the things referred to in the cases above were not for sale or consumption can have no legal effect upon the situation, because the rights of the legal owner of the goods are maintained in all of the California cases, regardless of that question.

It will be noted that in one of the cases the contract is *"valid in the absence of fraud."* Fraud is neither alleged by counsel nor attempted to be proved. We urge for the earnest consideration of the court upon the rehearing of this case, the good faith of the parties herein throughout the entire controversy.

We respectfully refer the court to Bierce v. Hutchins, 205 U. S. 304.

In that case the question was raised as to whether the contract was one of conditional sale or one in which title passed. On page 347 the court say:

"With the development of its effects there has been some reaction against the Benthamite doc-

trine of absolute freedom of contract. But courts are not legislatures and are not at liberty to invent and apply specific regulation according to their notions of convenience. In the absence of a statute their only duty is to discover the meaning of the contract and to enforce it, without a leaning in either direction, when, as in the present case, the parties stood on an equal footing and were free to do what they chose.

"That contract says in terms that it is conditional and that the goods are to remain the property of the seller until payment of the note given for the price. *This stipulation was perfectly lawful.* Harkness v. Russel, 118 U. S. 663. So that the only question is whether any other provision of the contract is inconsistent with this one and qualifies and explains it as intended to do less than it purports to do when taken alone. Chicago Railway Equipment Co. v. Merchants National Bank, 136 U. S. 268. The fact that possession was to be and was delivered, and that it must have been contemplated that the rails would be put down upon a roadway no doubt assumed, it seems, wrongly, to belong to the Kona Company, had no such effect, as between vendor and vendee. Neither did the requirement of additional security in the form of first mortgage bonds of the company. It may have been expected that the mortgage would embrace a part or the whole of this property, but there is nothing more common than a provision in a mortgage that it shall apply to and embrace future acquired property, with sufficient description to ascertain the same and bring it within the mortgage when acquired. And if the mortgage would have been operative at once, by way of estoppel in favor

of three persons, there was the more reason for exacting an interest under it to save the vendor's rights in that event. Of course, *the absolute liability for a price,* and putting that liability in the form of a note, *are consistent with the retention of title until the note is paid.* Parties can agree to pay the value of goods upon what consideration they please (White v. Solomon, 164 Mass. 516), and when a purchaser has possession and the right to gain the title by payment, it cannot complain of a bargain by which he binds himself to pay and is not to get the title until he does."

The fourth syllabus is:

"*The absolute liability for the price* and putting that liability in the form of a note are consistent with the retention of title until the note is paid; and, in the absence of statute, a stipulation that the sale is conditional and the goods remain the property of the seller, until payment of a note given for the price, is lawful and enforceable in replevin even where, as in this case, possession was given and conditional security of mortgage bonds was required."

III.

This Honorable Court having held that "*as between the parties to this contract,* we are unable to make anything more of it than what it purported, namely, a mere *consignment* of the goods to the W. D. Newerf Rubber Company for sale upon the terms and conditions therein stated," it must be held, in view of the foregoing decisions, that *the contract is valid as against creditors likewise,* unless, as held by this Honorable

Court in General Electric Company v. Brower, 221 Fed. 597, "the circumstances *outside* of the contract must have been such as to show that it was the intention of the parties to make of the contract a fraudulent concealment of an actual sale."

There was no attempt made by the trustee in the case at bar to go outside the contract to show any fraudulent circumstances surrounding or controlling the situation, and the case falls squarely within the words of the United States Supreme Court in the case of Ludvigh v. American Woolen Company, wherein Justice Day says:

> "It therefore follows that, if there are no other circumstances controlling the situation and establishing that this contract was a mere cover for a fraudulent or illegal purpose, *there is nothing in its terms* operating to transfer the title to the goods to the Niagara Company, or to prevent the return of those unsold to the Woolen Company, or their being retaken by that company upon the happening of the contingency shown in this case."

Construing section 47a of the Bankruptcy Act, giving the trustee in bankruptcy the right of an execution creditor, we are still placed in exactly the position Vermont Marble Co. v. Brow, *supra,* for if the execution creditor cannot recover, then we urge that the trustee in bankruptcy cannot recover.

Further, we ask the court for earnest consideration of the question: What difference would there be in the rights of an execution creditor as to a stock of goods on hand for sale, whether said stock was held

under an *agency* contract, a *consignment* contract, or a *contract* of conditional sale, when, as in this case, and as in a number of other cases of like character, said *execution creditor knew absolutely nothing about the character of the contract or the legal status of the parties in relation thereto.* All of the decisions of the state of California and of the United States courts, including this Honorable Court (especially in General Electric Co. v. Brower), hold that if the stock of goods is held by the bankrupt under an *agency* contract, that *the validity thereof cannot be questioned by an execution creditor or a trustee in bankruptcy.* We urge, therefore, that the same rule applied by this Honorable Court to agency contracts must be applied to a consignment contract, or a conditional sales contract (assuming the 1911 contract to be either), unless circumstances outside the contract show a fraudulent concealment by which creditors are defrauded,—and no such showing is even attempted.

Further upon the question of fraud: *If this contract is a fraud upon creditors in and of itself, the same rule would be applied to an agency contract, to-wit: the contract of 1914; the same rule would have been applied to all of the California cases above cited.* Since the persons attempting to purchase the property had no knowledge of the rights of the owner, the Supreme Court in the case of Vermont Marble Company v. Brow, *supra,* held that any "impolicy in allowing a severance of title and possession where an ultimate sale is designed by the parties, is for the consideration of the legislature and not the courts." *The legislature of the*

state of California has not seen fit to pass a statute upon the subject.

Further upon the question of fraud: If the contract of 1911 in the case at bar is in and of itself, as held by this Honorable Court, a fraud upon creditors, would not the same rule apply to all of the cases of the United States courts cited by us, whether it be an *agency* contract, or *consignment* contract, or *conditional sales* contract.

Further upon the question of fraud: We respectfully refer to the court for its earnest consideration the case of Bryant v. Swofford, 214 U. S. 279, 22 Am. B. R. 111, wherein it says:

> "There is nothing in the nature of this contract which would forbid the parties from entering into it if it is valid by the laws of the state where made, but in bankruptcy the construction and validity of such a contract must be determined by the local laws of the state."

We urge that there is nothing inherently wrong in a contract of the nature of the one under consideration, especially when we consider the many decisions of the Supreme Court of California, and of the federal courts, including the Supreme Court of the United States, holding them valid.

The court will notice that in Bryant v. Swofford, *supra,* that this was a stock of goods to be sold *"in the ordinary course of business,* but not otherwise." It is true that the proceeds of the sale belonged to the vendor, but we cannot comprehend how that question

makes it a fraud upon creditors, or how that question is involved in the case.

Further upon the question of fraud: It is *neither* an *issue* in the case, *nor is there any claim made by the trustee of there being any evidence in the case, that creditors relied upon this stock of goods,* either under the agency contract of 1914 or the contract of 1911, which we urge is also an agency contract.

In this connection we respectfully refer the court to:

Ludvigh v. American Woolen Co., 231 U. S. 522, 31 Am. B. R. 481.

On page 487 the court say:

"It is not shown that any creditor relied upon mismarking or misbranding."

McElwain v. Bassett, 36 Am. B. R. 536 (May, 1916).

In this latter case the court on page 539 say:

"There is no evidence in the record that any creditor of Adkins was misled in any way by the course of dealings between the appellant and Adkins."

If the fact that a stock of goods in the place of business for sale would entitle a person dealing with the bankrupt to rely upon its being his property, then we further and again suggest that the rule would be applicable to all of the California cases cited herein, and all of the federal cases cited, as well as the decision of this Honorable Court in General Electric Company v. Brower, 221 Fed. 597.

In re A. A. Thomas, 36 Am. B. R. 600 (May, 1916), the first syllabus is:

> "In order to determine whether a contract is one of agency or consignment or whether it is one of conditional sale, it is always necessary to consider all the terms of the contract, so as to ascertain the intention of the parties. If it is intended and provided that the customer should be absolutely bound in all events to pay for the goods, the title being reserved in the vendor, then the contract is one of conditional sale. But if the vendor merely delivers the goods to the customer for sale by him as the agent of the vendor, the customer not being absolutely bound by the contract to pay for the goods, then the contract is one of consignment for sale or an agency to sell—it is a mere bailment."

The second syllabus is:

> "The conduct of the parties to a contract and the construction put on same by them is entitled to consideration."

The third syllabus is:

> "Provisions of a contract examined and HELD to constitute a *consignment* and *not* a conditional sale."

McElwain v. Bassett, *supra,* the syllabus is:

> "Provisions of an agreement whereby property was shipped to an alleged bankrupt for sale on commission examined and HELD not to constitute an absolute sale, nor a conditional sale, but a contract of factorage valid under the laws of Kansas, although not recorded, and that such property may be reclaimed from the trustee in bankruptcy.

"The fact that the parties to the contract conducted the business in relation thereto in an irregular manner, so long as no creditor of the alleged bankrupt was misled to his injury thereby, did not avoid the contract."

IV.

Intention of the Parties.

There being no issue of fraud in the case at bar, and no attempt by the trustee to show "other circumstances controlling the situation," *the intention of the parties to the contract should control* its proper interpretation.

Topliff v. Topliff, 122 U. S. 121.

The first syllabus is:

"When the language of a contract is ambiguous, the practical interpretation of it by the parties is entitled to great, if not controlling influence."

District of Columbia v. Gallaher, 124 U. S. 505.

The syllabus is:

"The practical construction which the parties put upon the terms of their own contract, and according to which the work thereunder was done, should prevail over the literal meaning of the contract, where one thereto seeks to obtain a deduction in the contract price in accordance with such literal meaning."

We urge consideration of the last four cases upon the question of the intention of the parties as being equally controlling with the law of the state. We have referred to the Transcript of Record, page 26, wherein the bankrupt himself stated that

> "the sales were made from the consigned stock of The Miller Rubber Company,"

and further, in Metropolitan National Bank v. Benedict, 74 Fed. 182 (C. C. A.), the court say:

> "Moreover, parties have the undoubted right to make their own contracts, and to put their own construction upon them, and to regulate their rights and liabilities thereunder. If the court 'leaves the parties to be governed by their understanding of their language, it, in effect, enforces the contract as actually made. That they should be so permitted to construe their own agreement accords with every principle of reason and justice.' St. Louis Gas Light Co. v. City of St. Louis, 46 Mo. 128; Mathews v. Danahy, 26 Mo. App. 660. And when both parties to a contract, acting in good faith, are agreed as to its meaning, and their rights under it, a stranger, having no interest in the subject-matter of the contract, cannot insist that a different interpretation shall be put upon it, or compel the parties to put that interpretation upon it which would benefit him."

We especially refer the court to the facts in this case, *it being a consignment of clothing for sale.* Here, therefore, we have another case of a consignment of goods for sale, and the Circuit Court of Appeals held that the contract was *not* a sale but a *contract of factorage* which passed *no* title.

We urge that by the clear intention of the parties, title in all of these goods was reserved, with the right to retake the same as to the unsold goods, and that upon giving due consideration to the points and authorities suggested above we urge that this Honorable

Court erred in holding that said contract is, in and of itself, a fraud upon creditors for the reasons and upon the grounds stated.

V.

The 1911 contract was abrogated by the contract between the parties, dated June 11th, 1914, and all property in the possession of the bankrupt on July 1st, 1914, is governed by the provisions of the latter contract.

The special master found that *"The Miller Rubber Company of California was organized for the purpose of acting as agent in handling and selling the goods of The Miller Rubber Company of Ohio* * * * and while it does appear from the evidence that the officers of the two corporations are the same * * * it is owned and controlled by the stockholders of The Miller Rubber Company of Ohio."

After the appointment of The Miller Rubber Company of California as the agent of The Miller Rubber Company of Ohio, and while the 1911 contract was still in force, the bankrupt and The Miller Rubber Company of Ohio, through The Miller Rubber Company of California, its agent, entered into the 1914 contract, the last paragraph of which expressly provides:

> "This contract and supplement shall supersede all contracts, agreements or understandings of any nature now existent between The Miller Rubber Company or The Miller Rubber Company of California and W. D. Newerf Rubber Company or W. D. Newerf, and such contracts, agreements and understandings shall be and are considered null and void, except as to the unpaid accounts."

We respectfully urge for the earnest consideration of the court the fact that this contract took effect about July 1st, 1914, *about nine months preceding the bankruptcy proceedings herein.* How may it be said that as to creditors of the bankrupt title to the goods shipped under the 1911 contract *passed* to the bankrupt when it must be conceded that the contract of 1914 wholly superseded the contract of 1911. We earnestly ask the court: What was the status of the title to these goods between July 1st, 1914, and March 20th, 1915 (the date of the proceedings in bankruptcy)? We do not comprehend how title to these goods passed to the bankrupt under the 1911 contract "as a fraud upon creditors" when *there were no legal relations arose as between the bankrupt and his creditors, and the petitioners herein, while said contract of 1911 was in effect.* Now, that being conceded to be true, leaving due consideration for the intention of the parties in the interpretation of their contract, we urge that all property on hand, or shipped after July 1st, 1914, was necessarily held by the bankrupt on *consignment* under the 1914 contract.

We respectfully urge that the decision of this Honorable Court in this case, upon the right to recover the personal property now on hand, is contrary to the long line of decisions of the United States courts, including this Honorable Court, and contrary to the decisions of the Supreme Court of California upon the same subject.

VI.

We, therefore, respectfully urge the following points for reconsideration of this court upon the rehearing thereof:

First: The validity of the contracts in question must be governed by the law of the state of California. Under the law as established by the Supreme Court of California, a consignment contract, good as between the parties thereto, is good as against an execution creditor in the absence of proof of circumstances outside the contract showing a fraudulent concealment to the injury of creditors. Such is the law announced by this court in former decisions, as well as by the United States Supreme Court in Ludvigh v. American Woolen Co.

Second: The 1911 contract, being as between the parties, a valid consignment contract, is good as against the trustee in bankruptcy, no issue of fraud having been raised, and no attempt having been made to go beyond the terms of the contract.

Third: The 1911 contract was abrogated by agreement between the parties, and the ownership of all goods in the hands of the bankrupt on July 1st, 1914, must be governed by the contract of June 11, 1914.

Wherefore, your petitioners pray that they may be granted a rehearing upon oral argument upon this most important subject; and that upon said rehearing said decision may be reversed and judgment rendered for your petitioners.

Respectfully submitted,

The Miller Rubber Company.

The Miller Rubber Company of California.

By Bicksler, Smith & Parke,

Their Attorneys.

Certificate of Good Faith.

We, the undersigned, as counsel for The Miller Rubber Company and The Miller Rubber Company of California, petitioners herein, present and file herewith a petition for a rehearing of this case.

We, and each of us, do hereby certify that the foregoing petition is filed in good faith in the full belief and opinion that the case of the petitioners is a meritorious one, and should be reconsidered by this Honorable Court.

And we further certify that this petition for a rehearing is not filed for purposes of delay.

W. Scott Bicksler,
W. C. Smith,
Dale H. Parke,

Attorneys for The Miller Rubber Company and The Miller Rubber Company of California.